IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CIVIL JURISDICTION

WRIT PETITION NO.1131 OF 2005

M/s.Navnitlal & Co.).. Petitioners

Versus

M/s.Nirmay Sagar Printing Press).. Respondents

Mr.Nitin V. Mhatre for the Petitioners.

Mr.Sachin Dhakephalkar for the Respondents.

CORAM: SMT.NISHITA MHATRE, J.

DATED: 18TH JULY 2005

P.C.:

. The Petitioner has filed the present Petition for appointing Commissioner for recording the evidence of the partner of the Petitioner firm. The submission made is that since the witness Lalit Pranlal Desai, a partner of the Defendant Company, is required to go out of Mumbai often and it would be difficult to attend the Court on different dates, a Commissioner should be appointed to record his cross examination. This application is made under Order XVIII Rule 4 of the Civil Procedure Code. After such an application was made, an affidavit has been filed in December 2004 stating that the witness Lalit Pranlal Desai has met with an accident and had suffered a slipped disc and a fracture and was advised bed rest. The appointment of a Court Commissioner is sought. The trial Court has refused the appointment of a

Commissioner.

2. There are no documents on record to indicate that the witness had suffered a slipped disc or was unable to attend the Court on medical grounds. The date of the accident has also not been mentioned. Apart from this, it is now sought to be argued that in view of the amendment to the Civil Procedure Code in 2002, a Commissioner should be appointed and is in fact being appointed as a matter of course for the purpose of recording evidence. However, the learned Advocate for the Petitioner was unable to point out any specific provision of the law indicating that the Commissioner should be appointed as a matter of course for recording the evidence. The only submission made is that statement and objects and reasons for the amendment of 2002 in Civil Procedure Code requires that proceedings should be disposed of at the earliest.

3. The submission of the learned Advocate is unsustainable. Although Order XVIII Rule 4 of the Civil Procedure Code empowers the Court to appoint a Commissioner for recording evidence, it is not necessarily that in every case such a procedure is to be adopted. It does not mean that in all proceedings a Commissioner should be appointed as a matter of right. After filing an affidavit in the form of

examination-in-chief, the provisions of Order XVIII Rule 5 have to be followed. It is only in exceptional cases that a Commissioner is to be appointed for recording evidence and not as a matter of course as is sought to be urged. The fact that the witness is required to leave Mumbai very often, is not a cogent reason for the trial Court to appoint a Commissioner. Furthermore, there is no documentary proof in the present case to show that the witness has in fact suffered a slipped disc and is physically unable to attend Court. There is no need to appoint Court Commissioner. Reliance placed by the learned Advocate for the Respondents in the judgment of the Orissa High Court in the case of *Shyam Sundar Rout* vs. *Braja Kishore Pradhan*, **AIR 2004 ORISSA 171** is apt. Writ Petition dismissed.

4. Mr.Mhatre prays that the stay granted earlier be extended. Prayer refused.